IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES P. SCANLAN on his own behalf and all others similarly situated, et al.	:	CIVIL ACTION
v.	:	
AMERICAN AIRLINES GROUP, INC., et al.	:	NO. 18-4040

MEMORANDUM

Bartle, J. November 2, 2022

Plaintiffs James P. Scanlan, an American Airlines pilot and a retired Major General in the United States Air Force Reserve, and Carla Riner, an American Airlines pilot and a Brigadier General in the Delaware Air National Guard, have brought this class action against defendants American Airlines Group, Inc. ("AAG") and American Airlines, Inc. ("American") pursuant to the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. §§ 4301 et seq., and for breach of contract. Plaintiffs assert that for the period between January 1, 2013, and October 31, 2021, they and the class of American pilots they represent have not received the compensation or benefits due to them under USERRA and under the contract.

Before the court are the cross-motions of the parties for summary judgment. Defendants seek summary judgment as to

all of plaintiffs' claims while plaintiffs seek summary judgment only on their breach-of-contract claim.

I

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A dispute is genuine if the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986).

The court views the facts and draws all inferences in favor of the nonmoving party. See In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 (3d Cir. 2004). When reviewing cross-motions for summary judgment, the court "must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." Auto-Owners Ins. Co. v. Stevens & Ricci Inc., 835 F.3d 388, 402 (3d Cir. 2016) (quoting 10A Charles Alan Wright et al., Federal Practice & Procedure § 2720 (3d ed. 2016)).

II

The following facts are undisputed. Although American permits its pilots to take leaves of absence to serve in the military, it does not compensate them for their time away from the job. In contrast, American offers its pilots three days of paid bereavement leave upon the death of a qualifying relative. If pilots are summoned for jury duty, they receive the differential between their regular compensation and the payment they receive as jurors.

Scanlan and Riner represent a class of individuals who at some point during the class period simultaneously served as pilots with American and as members of a military branch.[1] As noted above, they advance three claims against defendants. Under count III, plaintiffs seek a declaratory judgment that USERRA obligates American to provide them with paid short-term military leave, which plaintiffs define as periods of sixteen days or fewer. They further seek damages in an amount equal to

1. The court has certified six subclasses in this action. For each of the three counts in plaintiffs' second amended complaint, there are two subclasses--one for American pilots who currently serve in the military and one for either former American pilots who were employed with the airline and with a military branch during the class period or current American pilots who previously served in the military during the class period. The court has also excluded from each class any pilot responsible for administering the AAG profit-sharing plan as well as pilots who reached individual settlements with or judgments against AAG or American over unpaid short-term military leave. See Scanlan v. Am. Airlines Grp., Inc., Civ A. No. 18-4040, 2022 WL 1028038 (E.D. Pa. Apr. 6, 2022).

the difference between their salary at American and the amount of compensation received for their military service for periods of short-term military leave during the class period.

Count I, also a claim under USERRA, focuses on the profit-sharing plan of AAG, American's parent company. Under the profit-sharing plan, AAG shares five percent of its pre-tax profits with employees of American as well as its other subsidiary airlines. AAG calculates each participant's individual award by dividing the five percent of its pre-tax earnings by the aggregate amount of all participants' eligible earnings and multiplying this resulting percentage by an individual participant's eligible earnings. AAG has not credited military leave time as part of pilots' eligible earnings. Plaintiffs seek to compel AAG to recalculate and pay profit-sharing awards in a manner that credits imputed income for the time they spent serving in the military. The profit-sharing plan, it should be noted, was established at AAG's initiative and is not the product of any collective bargaining agreement with the pilots or their unions.

Count II alleges a state-law breach-of-contract claim. Plaintiffs contend that regardless of USERRA the language of the profit-sharing plan obligates AAG to credit periods of military leave when calculating plaintiffs' annual profit-sharing awards.

III

The essence of plaintiffs' claim in Count III is that American has violated USERRA by not compensating its pilots for the pay differential when they take military leave despite compensating them when they are on jury duty and bereavement leave. Under USERRA, employees who take military leave are "entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees . . . who are on furlough or leave of absence." 38 U.S.C. § 4316(b)(1)(B). As explained by our Court of Appeals, employers must offer employees compensation for military leave "when they choose to pay other employees for comparable forms of leave." Travers v. Fed. Express Corp., 8 F.4th 198, 199 (3d Cir. 2021).

The Department of Labor has promulgated regulations interpreting § 4316(b). The relevant regulation provides that an employee is entitled to "the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services." 20 C.F.R. § 1002.150(b). The regulation also offers guidance for courts to consider in deciding whether a form of leave is comparable to military leave:

> In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral

> leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

Id.

American moves for summary judgment on plaintiffs' USERRA claim under count III on the ground that leaves for jury duty and bereavement are not comparable to military leave.[2] It contends that military leave is distinguishable from the other forms of leave in duration, frequency, purpose, and the ability of a pilot to choose when to take that leave.

A.

American maintains that for comparison purposes the average duration of all military leaves should be considered rather than the average duration of only short-term military leaves of sixteen days or fewer as plaintiffs allege. American argues that the comparison analysis under the regulation requires that courts treat all military leaves the same. Other courts have endorsed this "generalized" approach. See, e.g.,

2. American rehashes its argument that pay during leave is not a "right" or "benefit" within the meaning of USERRA. This court rejected that argument at the motion-to-dismiss stage. Scanlan v. Am. Airlines Grp., Inc., 384 F. Supp. 3d 520, 526 (E.D. Pa. 2019). Our Court of Appeals confirmed this understanding of USERRA in Travers v. Federal Express Corp., 8 F.4th 198, 205-06 (3d Cir. 2021). Federal courts have "uniformly" agreed with this approach. E.g., Haley v. Delta Airlines, Inc., Civ. A. No. 21-1076, 2022 WL 950891, at *4 (N.D. Ga. Mar. 29, 2022).

Clarkson v. Alaska Airlines, Inc., Civ. A. No. 19-0005, 2021 WL 2080199, at *5 (E.D. Wash. May 24, 2021), appeal filed (9th Cir. June 22, 2021). Here, however, plaintiffs have expressly limited the relief they seek in their second amended complaint to leave periods of sixteen days or fewer. They are the masters of their complaint entitled to frame their claim and limit their potential recovery in this way. Accordingly, the court will consider only military leave periods of sixteen days or shorter.

There is no dispute over the number of days during which American pilots have taken military leave, bereavement leave, and jury duty leave. American pilots spend on average more time on leave for military service than they do for jury service or bereavement. The average duration during the class period of a single stint of short-term military leave is 3.2 days. The average duration of a period of bereavement leave is 2.68 days while the average duration of a period of leave for jury duty is 1.84 days.

An analysis of the frequency of military leave, along with duration, is necessary to have a complete picture. When the frequency of each type of leave is calculated, the difference between the amount of time American pilots spend on military leave as compared to bereavement and jury duty leave is stark. Pilots who took military leave in any given year took an average of seven periods of such leave that year during the

class period. By contrast, pilots who performed jury duty service in any given year took an average of 1.3 leave periods, and pilots who took bereavement leave took 1.2 leave periods. Thus, among pilots who took one of these forms of leave in a particular year, the average number of days during which a pilot was away from the job on short-term military leave was 21.9 days, while it was 3.1 days for bereavement leave, and 2.3 days for jury duty. There is a distinct difference among the three types of leave not only in the average time away from the job in a year but also in the fact that a pilot's military leave generally recurs on a regular basis and often over a number of years while the other forms of leave are generally short-term and sporadic.

Plaintiffs argue frequency is an improper consideration because it is not enumerated as a consideration in § 1002.150. However, the regulation's list of factors is expressly nonexhaustive. See, e.g., Clarkson, 2021 WL 2080199, at *5. This is evidenced by the regulation's use of the phrases "may be" and "such as." Plaintiffs also maintain that considering frequency would contravene USERRA's purpose. The court disagrees. There is nothing in the language or purpose of USERRA or its interpreting regulations which forbids consideration of frequency in determining the issue of comparability. Furthermore, analyzing the duration of the

average military leave without considering frequency of military leave provides a false impression in any comparison of military leave with jury duty and bereavement leave.

B.

American next argues that short-term military leave is distinguishable from other forms of leave in a pilot's ability to control when to take leave. American notes that pilots have no control over when bereavement leave will be necessary or when they must appear for jury duty, although American concedes that postponement for jury duty may sometimes be granted.

The record reflects that pilots have varying levels of flexibility in scheduling when to perform military service. Some annual drill days are scheduled in October the year before. In addition, some commanding officers will accommodate the pilots' schedules. For example, Scanlan admitted that he has "negotiat[ed]" the dates on which he has performed certain required air missions. Riner testified that by virtue of her position as a senior officer she was permitted to issue an order to herself that required her to schedule her own military leave. J.F. Joseph, an American Captain and former Naval officer, corroborated that pilots have "unique and significant flexibility . . . in how they schedule their military service periods" and that military commanders schedule short-term duty periods "with as much advanced notice and flexibility as

possible, to lessen the impact of military reserve absences on employers."

Plaintiffs dispute the extent to which pilots have flexibility in scheduling their military service. They cite Joseph's testimony in which he acknowledges that a pilot's flexibility may be constrained by factors outside a servicemember's control such as the availability of aircrafts or the nature of a training event. Scanlan noted that weather and staffing concerns also limit flexibility. Patrick O'Rourke, an American pilot and retired member of the United States Marine Corps, testified that there is "virtually no flexibility" when it comes to performing certain duties under military orders. There is no dispute that for certain events set by military order, for example a "drill weekend," once the date has been set, attendance on that date is compulsory.

Plaintiffs also contend that the work assignment system of American bears some responsibility for creating the scheduling conflicts that necessitate short-term military leave. Pilots submit scheduling preferences for any given month on or before the 13th day of the prior month. American considers these preferences along with each pilot's seniority when scheduling pilots for the month, but not every pilot receives his or her first-choice schedule. Thus, plaintiffs contend that American pilots do not always have advanced notice of conflicts

between their work and military schedule. In addition, the relevant collective bargaining agreement requires American pilots to notify the airline of known military absences and to attempt to schedule their trips around those dates. Accordingly, pilots "may not intentionally create a conflict between their military duties and their duties flying for American."

Even taking the facts in the light most favorable to the plaintiffs, pilots often have significantly more flexibility in scheduling military leave than they do with respect to jury duty and bereavement leave.

C.

American further contends that military leave varies from bereavement and jury-duty leave in its purpose. Jury duty is public service which satisfies a compulsory obligation to the justice system. Bereavement leave serves the dual purposes of allowing pilots to grieve loved ones and providing them time to ensure they are emotionally fit to fly. In contrast, American characterizes plaintiffs' military service as akin to a "parallel career."

Plaintiffs disagree. They argue that each of these leaves serve the purpose of "satisfy[ing] compulsory obligations to others." There is no doubt that jury service is an important civic duty. Plaintiffs contend that bereavement leave also

falls into the category of service for others--satisfying obligations to mourn deceased family members and to ensure flight safety. They assert that American's characterization of military service as a "parallel career" undersells the "public service dimension of military service."

In sum, it cannot be disputed that the purposes of the three types of leave are different. Unlike bereavement leave and jury duty, those who take military leave do so not only out of a sense of patriotism but also for more than minimal compensation from the Government and sometimes pensions[3] for their service over an extended period and often for years.

D.

In assessing duration, frequency, control, and purpose, the court concludes as a matter of law that the undisputed evidence demonstrates that jury duty and bereavement leave are not comparable to military leave. Thus, American has not violated § 4316(b)(1) of USERRA. As noted above, for pilots who took short-term military leave, the average time away from the job on military leave annually is over 21 days while absence on jury duty is 2.3 days and on bereavement leave is 3.1 days. These figures are no more comparable than the home run records

3. While none of the parties has mentioned this fact, the court takes judicial notice that pensions are paid to those serving in the military if their service is of sufficient length.

of two baseball players, one who hits 21 home runs in a season and the other who hits three. Looking only at the average length of individual periods of military leave makes no sense, just as it makes no sense to compare the home run records of these two baseball players by looking only at the fact that both hit no more than one home run in any game. A pilot's military leave is accompanied with more than minimal Government pay and sometimes a pension and generally recurs at regular intervals over a number of years while the two other types of leave consist of short-term events and are infrequent with no outside pay for bereavement leave and minimal Government pay for jury duty with no pension. Moreover, military leave is significantly different in its purpose and in the degree of control which a pilot has over when to take that leave. Accordingly, the motion of American for summary judgment on plaintiffs' USERRA claim in count III of plaintiffs' second amended complaint will be granted.

IV

AAG has also moved for summary judgment as to count I of plaintiffs' second amended complaint, which is also a claim under § 4316(b)(1) of USERRA but related to payments from AAG's profit-sharing plan. AAG contends that it does not need to credit short-term military leave when calculating each pilot's award under the plan because short-term military leave is not

comparable to jury duty and bereavement leave. The comparability analysis for plaintiffs' claim against American for pay while on military leave in count III applies equally to their claim against AAG for inclusion of imputed income while on military leave in the calculation of profit-sharing awards. Accordingly, the motion of AAG for summary judgment on count I will likewise be granted.

V

Finally, the parties have filed cross-motions for summary judgment as to plaintiffs' breach-of-contract claim under count II. They dispute whether the AAG profit-sharing plan by its terms requires credit for military leave as compensation.

The profit-sharing plan calculates each participant's share of the plan's annual award based on his or her "Eligible Earnings." The profit-sharing plan defines "Eligible Earnings" as "'Compensation,' as that term is used for purposes of employer contributions" under the employee's applicable 401(k) plan. Thus, the court must determine whether the 401(k) plan for American pilots treats as compensation imputed income for time spent in military service.

The American 401(k) plan provides: "'Compensation' means, unless a different definition expressly applies pursuant to Section 3.6," a series of types of employer contributions

listed under section 1.19. Military leave is not listed in section 1.19 or in the cross-referenced section 3.6. The 401(k) plan does, however, address "Qualified Military Service" in section 3.5:

> Notwithstanding any other provision of the Plan to the contrary, contributions, benefits and service credit with respect to qualified military service shall be provided in accordance with [Internal Revenue Code] section 414(u). For these purposes, during a period of qualified military service, an Eligible Employee will be considered to have received Compensation from the Employer at the same annual rate as the Eligible Employee's average rate of Compensation from the Employer during the 12 months immediately preceding the qualified military service (or, if shorter, the period of employment preceding the qualified military service).

Thus, the court must determine if the definition of "compensation" under section 1.19 of the 401(k) plan is exclusive or if section 3.5 adds military leave as a form of compensation.

Texas law governs the contract. Under Texas law, construction of a contract is generally a question of law. See, e.g., Perthuis v. Baylor Miraca Genetics Labs., LLC, 645 S.W.3d 228, 235 (Tex. 2022). "Only if ambiguity remains after applying the pertinent rules of construction could there be a fact question about intent." Id. (internal quotation marks and citation omitted).

Plaintiffs argue that section 3.5 of the 401(k) plan requires that time spent on military leave must be included in determining the profit-sharing plan awards. Plaintiffs assert that section 3.5's treatment of military leave as compensation supersedes or at least modifies section 1.19's definition of "compensation" due to section 3.5's inclusion of the phrase "Notwithstanding any other provision of the Plan to the contrary."

AAG counters that section 1.19 and its cross-reference to section 3.6 provides the sole definition of "compensation" under American's 401(k) plan. As mentioned above, section 1.19 does not include imputed income from time spent on military leave, and section 3.6 addresses a wholly unrelated matter. AAG emphasizes that the clause of section 3.5 that requires it to credit military leave under the 401(k) plan is "[f]or . . . purposes" of complying with § 414(u) of the Internal Revenue Code. This provision of the tax code is applicable only to pension plans and not to profit-sharing plans.

The court concludes that AAG has the better argument on the construction of the profit-sharing plan. Section 3.5 of American's 401(k) plan expressly states that the reason for including imputed income during military leave is "for [the] purposes" of ensuring the 401(k) plan complies with section 414(u) of the Internal Revenue Code. Section 414(u) of the

Internal Revenue Code is applicable only to pension plans. This court has held that the AAG profit-sharing plan in issue here is not a pension plan. See Scanlan v. Am. Airlines Grp., Inc., 384 F. Supp. 3d 520, 531 (E.D. Pa. 2019). Consequently since the sole reason for including imputed income while on military leave in the 401(k) plan is for tax purposes not relevant to the profit-sharing plan, compensation under the profit-sharing plan does not include imputed income while on military leave. The definition of compensation in section 1.9 of the pension plan governs without reference to section 3.5.

Regardless of this court's interpretation, Texas law requires the court to defer to an employer's interpretation of its benefit plan under an employment contract if the contract vests the employer with discretion to interpret the plan:

> where there is an employer-funded plan which is made a part of the employment contract between the employer and the employee, and with provisions which make the employer's determination final, that if the employer determines that an employee is not entitled to benefits, the only way that determination can be attacked is by showing that there was bad faith or fraud in the employer's actions.

Macy v. Waste Mgmt., Inc., 294 S.W.3d 638, 648 (Tex. App. 2009) (citation omitted).

The AAG profit-sharing plan vests "complete discretion and authority to administer the Plan and to control its

operation" in the Compensation Committee of the Board of Directors of AAG ("Compensation Committee"). This discretion and authority includes "the power to determine which Employees shall be designated Participants in the Plan [and] . . . to interpret the Plan and the profit-sharing awards." The plan also provides: "Any determination, decision or action of the Committee in connection with the construction, interpretation, administration or application of the Plan shall be final, conclusive, and binding upon all persons, and shall be given the maximum deference permitted by law." There is no dispute that the plan has been interpreted and awards paid from the beginning in a manner that credits as compensation only W-2 wage income and has not included imputed income while on military leave in calculating awards.

The evidence before the court cannot be read as demonstrating anything other than that it was the Compensation Committee that made these determinations. While AAG also argues that AAG designated American's officers to interpret and administer the plan, there is no evidence called to the court's attention that AAG did so. The person to whom AAG makes reference is Kim Wicker, the Director of Compensation of America Airlines. She testified that she simply oversaw the calculations of the awards for each recipient. There is nothing in the record that she engaged in any interpretation of the

plan. According to Wicker, an audit report is submitted to the Compensation Committee annually before awards are disbursed. She waits until after the report has been submitted and the Compensation Committee has met before making any payouts. She is not identified as an officer of either AAG or American, and her involvement can only be described as ministerial.

Plaintiffs further argue that there is no record that the Compensation Committee ever adopted a separate written legal interpretation of the definition of compensation under the AAG profit sharing plan. This argument misses the mark. The law makes no such requirement. All that is required is an employer's determination about what the plan means. Actions, not words, are decisive. See Macy, 294 S.W. 3d at 648.

The AAG Compensation Committee has made its determination, and there is no evidence that it has acted in bad faith or engaged in fraud. The Compensation Committee's construction of term compensation is reasonable and has been its construction from the beginning. At the inception of the plan, the pilots' union was informed that plan awards would be calculated without including imputed revenue that pilots would have received had they not been on military leave. One pilots' union representative testified that prior iterations of AAG profit-sharing plans have historically credited only W-2 income. Even if the court is incorrect in its interpretation of the

definition of compensation in the profit-sharing plan, it must defer under Texas law to the good faith determination of AAG's Compensation Committee that only W-2 income is included in calculating profit-sharing awards.

Plaintiffs have cited Mauldin v. Worldcom, Inc., 263 F.3d 1205 (10th Cir. 2001) to support its argument that AAG under Texas law did not properly delegate the authority to anyone to interpret the profit-sharing plan and did not ratify the unauthorized acts of the person who did interpret it. This case is inapposite. There, plaintiff sued his former employer over denial of benefits under an employment stock option agreement. The company's board of directors had delegated to its compensation committee the interpretation and administration of the agreement. It was undisputed that the vice president of the defendant-company, who was not a compensation committee member, made the decision to deny the plaintiff's claim that his benefits had vested under that stock option agreement. The board thereafter passed a resolution retroactively adopting all actions taken by the vice president. The resolution, however, did not specifically reference the employee's claim, the vice president's decision to deny the employee's claim under the stock option agreement, or his reasons for denying the claim. Applying Texas law, the Tenth Circuit held that this resolution was insufficient to support ratification of the vice president's

unauthorized interpretation of the agreement. The Court reasoned that the board did not have before it sufficient information to make an informed decision.

Here, in contrast, there is no evidence that anyone other than the members of the AAG Compensation Committee made the determination as to how the profit-sharing plan should be interpreted. Wicker did not make the decision as to what compensation meant. Wicker's position and role were far less consequential than the position and role of the vice president in Mauldin who had made the critical decision adverse to the plaintiff there.

The motion of plaintiffs for summary judgment as to their breach-of-contract claim under count II of their second amended complaint will be denied.[4] Defendants' motion for summary judgment as to plaintiffs' breach-of-contract claim will be granted.

4. Plaintiffs have also moved for summary judgment on the affirmative defenses of laches, estoppel, and waiver, which defendants asserted in their answer. Defendants stated in their opposition to plaintiffs' motion that they do not intend to pursue any of these defenses. In light of the court's granting of summary judgment on all counts in favor of defendants, the motion of plaintiffs for summary judgment as to defendants' affirmative defenses of laches, estoppel, and waiver will be denied as moot.